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IN THE

Supreme Court of the United States

BARBARA GRUTTER, PETITIONER

v.

LEE BOLLINGER, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF BOSTON BAR ASSOCIATION, DWYER & COLLORA, LLP, DAY, BERRY & HOWARD, GOULSTON & STORRS, KROKIDAS & BLUESTEIN, LLP, SHAPIRO HABER & URMY LLP, STERNS SHAPIRO WEISSBERG & GARIN, TESTA, HURWITZ & THIBEAULT, LLP, AND WEISMAN & ASSOCIATES IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici are the Boston Bar Association ("BBA"), the nation's oldest bar association, representing over 10,000 Boston-based lawyers, and Dwyer & Collora, LLP, Day, Berry & Howard, LLP, Goulston & Storrs, PC, Krokidas & Bluestein, LLP, Shapiro Haber & Urmy LLP, Sterns Shapiro Weissberg & Garin, Testa, Hurwitz & Thibeault, LLP, and Weisman & Associates, Boston law firms, all of which have a strong interest in promoting diversity both within law schools and across the legal profession. More than ever, such diversity is critical to law firms' ability to attract and serve a diverse client base in today's global economy and to fulfill lawyers' professional obligations to promote confidence in and equal access to the justice system.

For the reasons set forth below, the *amici* believe that their goal of enhancing diversity in the legal profession cannot be achieved without recruiting significant numbers of law students and lawyers from varied racial and ethnic backgrounds. Such recruitment, in turn, depends on the existence of a racially and ethnically diverse pool of applicants to law schools and law firms. The *amici* therefore strongly support race-conscious admission policies at institutions of higher learning such as the University of

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[1] All parties have consented to the filing of this *amicus* brief. This brief was not authored by counsel for a party, in whole or in part, and no person or entity other than *amici* and their counsel have made a monetary contribution to the preparation or submission of this brief.

Michigan and the University of Michigan Law School. Affirmative action in higher education will hasten the integration of the still disproportionately white legal profession to the benefit of law firms, the profession, and society at large.

Law schools, and indirectly colleges, serve as the gatekeepers to the applicant pool from which law firms draw their attorney ranks. Without diversity in law schools, there can be no diversity in the legal profession or the judicial system. It is for this reason that law firms form partnerships with law schools to ensure that they are able to recruit from a pool of diverse and talented candidates. For the same reason, law firms have an economic interest in supporting the freedom of law schools to craft admission policies that will enroll those diverse and talented students in the first place.

The *amici* wish to add their perspective to the need for affirmative action voiced by major Fortune 500 companies and the American Bar Association in *amicus* briefs filed in these proceedings,[2] with a special emphasis on the needs of the private bar and its leading law firms.

[2] *See* Brief of 3M, Abbott Laboratories, American Airlines, Inc., Ashland Inc., Bank One Corporation, The Boeing Company, The Coca-Cola Company, The Dow Chemical Company, E.I. DuPont De Nemours and Company, Eastman Kodak Company, Eli Lilly & Company, Ernst & Young LLP, Exelon Corporation, Fannie Mae, General Dynamics Corporation, General Mills, Inc., Intel Corporation, Johnson & Johnson, Kellogg Company, KPMG International on Behalf of its United States Member Firm, KPMG LLP, Lucent Technologies, Inc., Microsoft Corporation, Mitsubishi Motor Sales of America, Inc., Nationwide Mutual Insurance Company and Nationwide Financial Services, Inc., Pfizer Inc., PPG Industries, Inc., The Procter & Gamble Company, Sara Lee Corporation, Steelcase, Inc., Texaco Inc., TRW Inc., and United Airlines, Inc., as *amici curiae* in support of Defendants-Appellants seeking reversal, *Grutter v. Bollinger*, 288 F.3d 732 (2002)(N. 01-1447) (hereinafter "Fortune 500 Brief"); *see also* Brief of the American Bar Association ("ABA") as *amicus curiae* in support of Defendants-Appellants, *Grutter*, (no. 01-1557)(hereinafter "ABA Brief").

SUMMARY OF ARGUMENT

Despite more than a quarter of a century of affirmative action and a rapidly growing national population of people of color,[3] the legal profession remains disproportionately white. In a market that demands diversity, the pool of lawyers of color is scarcely growing. Law firms continue to be challenged in their efforts to diversify their workforce, in part because of the relatively low numbers of law school graduates of color and in part because of competition with other legal sectors for candidates from the same small pool of lawyers of color. If colleges and law schools are forbidden to consider race, among other factors, in admission decisions, our nation's law firms may never be able to hire more than a token number of lawyers of color.

[3] We will refer to people "of color" rather than "minority" groups wherever possible. This term encompasses an even broader group than African-Americans, Hispanics, and Asian Americans. It also avoids any of the negative implications that the word "minority" may have.

The disparity between the racial and ethnic composition of our legal community and the composition of our society as a whole threatens the economic viability of the nation's law firms and the stability of the judicial system. First, the disparity hinders law firms' ability to attract and serve a diverse and multi-national client base, which is critical to their long-term survival. Second, the disparity undercuts the efforts of lawyers and law firms to gain public confidence in a rapidly diversifying society. Third, the disparity hinders the efforts of the organized bar to promote a fair and representative judicial system. Fourth and finally, the disparity limits the bar's effectiveness as it tries to fulfill its obligations to engage in pro bono activities by assisting the disadvantaged and underserved within our broader community. Attorneys' ability to act meaningfully as role models and educators, for instance, may be limited because they do not reflect or have experience with the diversity of the community they seek to serve. For these reasons, racial and ethnic diversity are essential components of the diversity of "experiences, outlooks and ideas"[4] that the *amici* seek to promote in the legal profession.

Amici bar association and law firms make concerted efforts to recruit and reach out to lawyers of color. Those efforts are already hampered because the number of students of color graduating from law schools is so low. If this Court restricts the ability of institutions of higher education to enroll and to

[4] *See Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 314 (1978).

graduate such candidates, the legal profession simply will not be able to achieve the level of diversity it desires.

Because achieving diversity in the legal profession is essential to fulfilling lawyers' obligations to clients and to society at large, *amici* add their voices in support of the University of Michigan and the University of Michigan Law School's race-conscious admissions programs.

ARGUMENT

I. THE SEVERE UNDER-REPRESENTATION OF LAWYERS OF COLOR IN THE NATION'S LAW FIRMS HARMS THE FIRMS' ECONOMIC AND PROFESSIONAL INTERESTS AND SOCIETY AS A WHOLE.

A. While The National Population Of People Of Color Is Sharply Rising, The Proportion Of Lawyers Of Color Is Stagnating.

According to the 2000 Census, 28% of the United States population is non-white. It is forecast that by the year 2050, 47% of all Americans will be African-American, Hispanic, Asian American, or Native American.[5] Yet, today the legal profession remains 90% white and lags far behind other professions with respect to diversity of its membership.[6] For instance, the combined African-American and Latino representation among lawyers was 7% in 1998, significantly lower than the combined total in the ranks of accountants, physicians, professors, and engineers.[7] The absence of lawyers of color is particularly severe at the top of the legal profession. At America's largest law firms, 96% of equity partners are white.[8] According to statistics compiled by the National Association of Law Placement, Inc., concerning the number of lawyers of color employed by the nation's largest law firms, Boston ranks below the national average, with few attorneys of color at the partner, associate, and summer associate levels.[9]

Moreover, in contrast to the rapidly increasing diversity of the U.S. population as a whole, the racial and ethnic diversity of the legal profession appears to be stagnating. The representation of lawyers of color among partners in large law firms remained virtually the same from 1991 through 1996, according to National Law Journal studies.[10]

The pipeline of law students of color offers little hope for improving this situation. The steady growth of non-white law student enrollment since 1985 ended in 1995.[11] Between 1995 and 2000, the enrollment of law students of color increased by only 0.04%, the

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[5] *See* Minority Business Development Agency, U.S. Department of Commerce, *Minority Population Growth: 1995 to 2050* (1999).

[6] *See* Chambliss, Elizabeth, American Bar Association, *Miles to Go 2000: Progress of Minorities in the Legal Profession* at 1 (2000).

[7] *See id.*

[8] *See* The NALP Foundation for Law Career Research and Education, Women and Attorneys of Color at Law Firms - 2002, at http://www.nalp.org/nalpresearch/mw02sum.htm.

[9] *See id.* (showing that the national average for partners of color is 3.71%, while Boston's rate is 2.81%; for associates, the averages are 14.27% nationally and 10.59% in Boston).

[10] *See* Wilkins, David B., *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. Inst. for Study of Legal Ethics 15, 19 (1999).

[11] *See* Chambliss, *supra* note 5, at 1.

slowest five-year increase in 20 years.[12]

The present availability of affirmative action programs at least offers some hope for improvement in the integration of the legal profession.

B. Racial and Ethnic Diversity Among Lawyers Is Critical To Law Firms' Economic And Professional Interests.

1. Law Firms Desire Diversity In Their Attorney Ranks To Effectively Attract And Retain An Increasingly Diverse And Global Client Base.

The nation's top law firms provide representation to a wide range of businesses, from the largest multinational corporations to emerging companies. This client base includes the service, finance, and production industries, both domestically and internationally. These clients recognize the importance of diversity to their own business success, and seek out diversity in the firms that represent them.

Clients specifically recognize racial and ethnic diversity as an important component of the overall diversity that they value. The service industry, for instance, clearly understands that people of color represent a significant and growing share of the consumer market; service firms accordingly strive to identify the needs of that market segment in order to

[12] *See id.*

maximize profits.[13] Additionally, the nation's leading corporations maintain a significant presence in the global market place which increasingly calls for employees adept at working with people from different cultures and proficient in international relations.[14] In short, for many businesses, diversity is not about what may be socially desirable, it is about sound business practices, and economic survival.

For these reasons, some of the nation's largest corporate entities are urging this Court to maintain race-conscious admissions policies in higher education. They argue compellingly that their ability to respond to the increasing globalization of the marketplace and the growing diversity of the U.S. consumer market is critical to their business success.[15]

[13] *See* generally, Fortune 500 Brief, *supra*, note 1.

[14] *See id.*

[15] *See, e.g.*, Statement of Interest of 3M, a large multi-national entity, attached to the Fortune 500 Amicus Brief, "[the company's] future hinges upon its ability to attract, deploy and maintain a diverse workforce capable of understanding, relating to, and satisfying the needs of its broad consumer base"; *see also*, brief of General Motors Corp. as *amicus curiae* in support of Appellants at 3-4, *Grutter*, (no. 01-1447)(stating "The ability of American businesses to thrive in the twenty-first century will depend in large measure on our nation's responses to two inevitable forces: the increasing global and interconnected nature of the world economy (*see, e.g.*, T.K. Bikson & S.A. Law, *Rand Report on Global Preparedness and Human Resources: College and Corporate Perspectives* (1994)("Rand Report") and the increasing diversity of our own population (*see, e.g.*, Minority Business Development Agency, U.S. Dep't of Commerce, *Dynamic Diversity* (1999)").

Corporations that hold diversity as a core value want to see the law firms they hire reflect that same basic value. Law firms want a diverse staff of lawyers to be better situated to respond to the needs of their corporate clients and the demands those clients face in the global market. This economic interest to better serve clients is, at least in part, what drives law firms to recruit and cultivate a diverse work force.[16] Research has identified a positive correlation between the level of integration among a law firm's attorneys and the demographics of a law firm's client base.[17]

2. The Lack Of Diversity In The Legal Profession Erodes Public Confidence In The Judicial System.

Law firms also pursue diversity for reasons beyond attracting clients. As professionals dedicated to upholding and enforcing the law, attorneys seek to inspire confidence in the legal profession and the judicial system as a whole. Diversity, in particular, racial and ethnic diversity, helps to inspire and maintain such confidence and thereby promotes equal access to the justice system. Conversely, a lack of diversity creates the impression that only certain people may gain access to and rise to positions of power within the American legal system. Law firms

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[16] *See* Chambliss, Elizabeth, *Organizational Determinants of Law Firm Integration*, 46 Am. U. L. Rev. 669, 730-736 (1997).

[17] *See id.*

"will not be healthy unless the society is healthy, and a healthy society in the twenty-first century will be one in which the most challenging, rewarding career possibilities are perceived to be, and truly are, open to all races and ethnic groups."[18]

The absence of lawyers and judges of color erodes public confidence in the effectiveness of our judicial system and its ability to serve all people. Lack of diversity fuels the perception that the legal system favors the white majority – who have superior access to legal training, to courts, to law schools, and to high-powered advocates – and that the system treats people of color unfairly because of their race and ethnicity.[19] Not only does that perception undermine the legitimacy of the judicial system, it also further discourages participation by people of color, creating a vicious self-perpetuating cycle of exclusion.

Moreover, the lack of diversity among the profession can only reinforce the poor public perception of lawyers, currently at an all time low.[20]

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[18] Bowen, William G. & Bok, Derek, *The Shape of the River, Long – Term Consequences of Considering Race in College and University Admissions*, 149 (1998).

[19] *See* Anderson, Philip S., *Justice and Inequality Don't Mix*, 85 A.B.A. J. 6, 6 (May 1999); Carter, Terry, *Divided Justice*, 85 A.B.A.J. 42, 43 (Feb. 1999); Lyles, Kevin L., *The Gatekeepers: Federal District Courts and the Political Process* at 237 (1997).

[20] *See* Daicoff, Susan, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 Am. U. L. Rev. 1337, 1340 (1997) ("In the last ten to fifteen years ... public opinion of attorneys and the legal profession has plummeted ....")

Racial and ethnic diversity is a critical component in inspiring public confidence in the legal profession and the justice system as a whole.

3. Law Firms Seek To Promote Diversity To Help Them Fulfill Their Responsibilities To Society At Large.

Finally, diversity matters to law firms because their lawyers serve as community and civic leaders. Lawyers need to be exposed to a broad and diverse range of human experience in order to understand the issues they are expected to address, and to provide effective leadership.[21] Interacting with a racially and ethnically diverse group of colleagues provides all lawyers with insight into a shared experience and culture that they may not be able to achieve outside the work environment. Such diversity is an important result of affirmative action admissions policies that

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(citation omitted); Bogus, Carl T., *The Death of an Honorable Profession*, 71 Ind. L.J. 911, 912 (1996); Litowitz, Douglas E., *Young Lawyers and Alienation: A Look at the Legal Proletariat*, 84 Ill. B. J. 144, 145 (1996) ("Public perception of lawyers is at an all time low ....").

[21] As this Court has long recognized, such diversity of experience is essential in a lawyer's education. As Justice Powell wrote, "'The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.'" *Bakke*, 438 U.S. at 314 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

benefit racial and ethnic minorities.

The Boston Bar Association and *amici* firms all sponsor public service initiatives, through pro bono work and public educational programs, which bring lawyers directly into contact with diverse local communities. A few examples, drawn from programs sponsored in whole or in part by the Boston Bar Association, include: the Volunteer Lawyers Project, which matches lawyers with suitable pro bono clients; the Boston Bar Association Summer Jobs Program, which provides a group of diverse Boston Public School students with opportunities to learn about the law by working at area law firms and other law-related employers; the BBA Children and Youth Outreach Project, which brings hundreds of BBA volunteers into public schools to conduct classes and mock trials to promote understanding of the law; the BBA September 11th Assistance Project, which provides free legal assistant to victims' families; the Boston Municipal Court Alternative Dispute Resolution Program; and the national Citizens School Project, which prepares students for leadership roles in the 21st century in part through apprenticeships with lawyers.

Another such program in which many of the *amici* law firms participate is the Federal Court Public Education Project, whose mission is to educate citizens about their civic responsibility and to teach the role of law and the justice system in American democracy.

By participating in those and similar programs, lawyers seek to serve as role models in the larger community and teach citizens, young and old, about

the law and the legal system. Lawyers can better fulfill these roles if they have been exposed to a diverse legal community. Moreover, if the group of lawyers performing these important public services more closely reflects the diversity of the communities they serve, that in itself sends a powerful message about the inclusiveness of the profession and the fairness of the justice system to all people, including those of diverse racial and ethnic backgrounds.

For all of those reasons, *amici* urge this Court to uphold the compelling state interest in promoting racial and ethnic diversity in the legal profession.

II. RACE-CONSCIOUS ADMISSIONS POLICIES IN THE NATION'S LAW SCHOOLS ARE VITAL TO THE MISSION OF LAW FIRMS TO INCREASE THE RACIAL AND ETHNIC DIVERSITY OF THEIR LAWYERS.

A. Law Firms And Bar Associations Are Striving To Diversify With Targeted Activities.

Many law firms in Boston and throughout the country undertake targeted recruitment efforts to increase the number of attorneys of color among their ranks. These efforts are conducted in tandem with law schools and include diversity job fairs, specialized programs for summer clerks, liaisons with career services personnel, mentor programs for law students, and scholarships for students of color. Some law firms band together with the common purpose of cultivating ethnically and racially diverse law students for

participation in the legal profession. For example, the Boston Lawyers Group, sponsored by most of the major law firms in Boston, serves as a conduit and mentoring mechanism to connect law students of color with law firms and mentors. Firms invest significant time and financial resources in these targeted recruitment activities.

Likewise, the Boston Bar Association has organized diversity outreach programs in response to the under-representation of lawyers of color in the profession. For example, it maintains ongoing programs with law schools specifically connecting with associations for law students of color. These programs share the goal of attracting a more diverse pool of applicants for positions in Boston's major law firms.

The success of the diversity efforts undertaken by the Boston Bar Association and Boston law firms depends on the ability of our nation's law schools to admit a meaningful number of students of color. Without such a diverse pool of law school graduates, even the best diversity initiatives will fail.

B. The Elimination Of Law School Affirmative Action Programs Will Significantly Thwart The Goal Of Diversity In The Legal Profession.

Nearly 25 years ago, this Court recognized that diversity in higher education is a compelling state interest. *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978). Justice Powell, writing the majority decision in *Bakke*, acknowledged the reality of

achieving equality, "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot--we dare not--let the Equal Protection Clause perpetuate racial supremacy." *Bakke* at 407. The logic of this holding remains equally vital today, if not more so, with the benefit of the experience of the last 25 years.

Any decision to ban consideration of race and ethnicity as factors in law school admissions would reverse the steps taken toward integration of law schools over the last 25 years, as foreshadowed by the precipitous decline in enrollment of students of color to law schools in states where such a ban has been enacted. In the year following *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996), which limited affirmative action at the University of Texas, enrollment at the University of Texas Law School fell from a four year average of 33 African-American students in a class of 400, to only 4 African-American students. That same year, 1997, the combined representation of African-Americans and Latinos declined at the University of Texas Law School from 14.6% to 7.4%.[22] Likewise, in the wake of California's Proposition 209, which limited affirmative action programs at the University of California at Berkeley's Boalt Law School, first year enrollment of African-American students dropped from 20 in 1996 to 1 in 1997. Similarly, at UCLA's law school, where an average of 26 African-American students had enrolled

[22] *See Chambliss, supra* note 5 at 2.

in the prior four years, only 10 enrolled in 1997.[23]

Indeed, studies demonstrate that the attack on affirmative action in law school admissions "threatens to stifle minority entry and advancement in the profession for years to come."[24] An analysis of law school admissions decisions for the years 1990 through 1991 shows that applicant pool admissions based solely on LSAT scores and undergraduate GPAs would cause African-American admissions to drop by 80%, Hispanic admissions to drop by 51%, Asian-American admissions to drop by 37%, and Native American admissions to drop by 55%.[25]

Moreover, two recent studies released on February 10, 2003, by the Harvard Civil Rights Project show that diversity in higher education cannot be achieved solely by programs admitting students at the top of their high school classes.[26] It is clear that these

[23] *See* Office of the President of the University of California, University of California's Law Schools, at http://www.ucop.edu/acadadv/datamgmt/graddata/lawnos.html.

[24] Chambliss, *supra* note 5 at 28.

[25] *See id.* at 24.

[26] *See* Marin, Patricia, & Lee, Edgar K., Harvard University, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* (2003) (analyzing Florida's Talented 20 program, implemented when the state ended affirmative action in state higher education admissions); Horn, Catherine & Flores, Stella M., Harvard University, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (2003) (comparing

type of "percent" plans alone cannot meet the diversity needs of law schools, law firms, and bar associations.

Race-conscious admission policies are more vital than ever to integrate the legal profession. These race conscious admission policies are positive, necessary and constitutional. Eliminating such policies would strike a severe blow to achieving real integration in the legal profession. As a result, the entire legal profession, as well as the citizens that the profession exists to serve, will be harmed.

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the experiences of Texas, California, and Florida, the three states with percent plans).

CONCLUSION

For the above reasons *amici* urge this Court to uphold the decision of the court below.

Respectfully submitted,

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